

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS THOMAS GARCIA,

Defendant and Appellant.

C090880

(Super. Ct. No. 66549)

In *People v. Garcia* (1986) 178 Cal.App.3d 814, we affirmed defendant Carlos Thomas Garcia's second degree murder conviction.

In 2019, defendant filed a petition for resentencing pursuant to Penal Code section 1170.95,¹ which amended California's felony-murder rule, among other things. The trial court denied the petition because defendant was the actual killer in the murder.

¹ Further statutory references are to the Penal Code.

Appointed counsel for defendant has filed an opening brief that sets forth the facts of the case and asks this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).)

Finding no arguable error that would result in a disposition more favorable to defendant, we affirm.

I. BACKGROUND

A jury found defendant committed second degree murder and personally used a firearm during the commission of second degree murder.

In our opinion affirming the conviction on direct appeal, we explained that defendant “admitted involvement in [the victim’s] death, but he claimed that it was an accident.” (*People v. Garcia, supra*, 178 Cal.App.3d at p. 818.) Defendant testified when he was showing his firearm to the victim, the firearm “accidentally discharged” when the victim grabbed it. (*Ibid.*)

In January 2019, defendant filed a section 1170.95 petition for resentencing, pursuant to recently enacted Senate Bill No. 1437 (2017-2018 Reg. Sess.).

After appointing counsel for defendant and receiving the parties’ briefs, the trial court denied the petition, ruling that defendant had “not made a prima facie showing,” and therefore was “not entitled to the relief sought,” because defendant was the “actual killer” in the murder.

Defendant appeals from that order.

II. DISCUSSION

Appointed counsel filed an opening brief setting forth the facts of the case and asking this court to review the record and determine whether there are any arguable issues on appeal. (*Wende, supra*, 25 Cal.3d 436.)

Whether the protections afforded by *Wende* and the United States Supreme Court decision in *Anders v. California* (1967) 386 U.S. 738 [18 L.Ed.2d 493] apply to an appeal from an order denying a petition brought pursuant to section 1170.95 is an open question.

Our Supreme Court has not spoken. The *Anders/Wende* procedures address appointed counsel's representation of an indigent criminal defendant in the first appeal as a matter of right and courts have been loath to expand their application to other proceedings or appeals. (See *Pennsylvania v. Finley* (1987) 481 U.S. 551 [95 L.Ed.2d 539]; *Conservatorship of Ben C.* (2007) 40 Cal.4th 529; *In re Sade C.* (1996) 13 Cal.4th 952; *People v. Martinez* (2016) 246 Cal.App.4th 1226; *People v. Kisling* (2015) 239 Cal.App.4th 288; *People v. Serrano* (2012) 211 Cal.App.4th 496.) Nonetheless, in the absence of Supreme Court authority to the contrary, we will adhere to *Wende* in the present case, where counsel has already undertaken to comply with *Wende* requirements and defendant has been afforded an opportunity to file a supplemental brief.

Defendant filed a supplemental brief, claiming: (1) he “is not the actual shooter in this case”; (2) ineffective assistance of counsel at his jury trial; and (3) ineffective assistance of appellate counsel on direct appeal. Defendant argues that his “conviction should be reversed and a new trial ordered.”

Defendant's contention that he is “not the actual shooter” is belied by the jury's verdict. (*People v. Wattie* (1967) 253 Cal.App.2d 403, 409.)

Thus, the trial court correctly ruled that defendant is statutorily ineligible for section 1170.95 relief. (See § 1170.95, subd. (a)(3) [prima facie case for relief requires a showing the petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made by Senate Bill No. 1437]; § 189, subd. (e)(1) [actual killer].)

Defendant's claims of ineffective assistance of counsel are beyond the scope of this appeal from the order denying his section 1170.95 petition. (Cf. *O&C Creditors Group, LLC v. Stephens & Stephens XII, LLC* (2019) 42 Cal.App.5th 546, 564, fn. 6 [declining to consider issues that were “beyond the scope of the [] appeal”]; *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 122, fn. 14 [“Because

the trial court . . . did not reach the . . . issue[],” it was “beyond the scope of th[e] appeal”).)

This appeal is not an appropriate venue for raising collateral attacks on defendant’s conviction, which we affirmed on appeal and is long since final. (Cf. *In re Spears* (1984) 157 Cal.App.3d 1203, 1208 [“habeas corpus is the appropriate means to remedy deprivation of the effective assistance of appellate counsel”].)

Having undertaken an examination of the entire record, we find no arguable error that would result in a disposition more favorable to defendant.

III. DISPOSITION

The order denying the section 1170.95 petition is affirmed.

/S/

RENNER, J.

We concur:

/S/

BLEASE, Acting P. J.

/S/

KRAUSE, J.